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Case Number 208,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SHAWN EVANS,	:	
	:	No. 208,2023
Plaintiff Below,	:	
Appellant/Cross Appellee	:	On Appeal from the Court of
	:	Chancery of the State of Delaware
v.	:	
	:	C.A. No. 2018-0454-LWW
AVANDE, INC.,	:	
	:	
Defendant Below,	:	
Appellee/Cross Appellant	:	

APPELLANT/CROSS-APPELLEE SHAWN EVANS' REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS APPEAL

Dated: September 27, 2023

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SUMMARY OF REPLY ARGUMENT

1. ***Defense of Count II alleging Breach of Duty.*** Avande cannot avoid the plain text of Section 145, which mandates indemnification to the degree of one's success in defending any claim, by relying on amorphous legislative history, and inapposite case law where claims were either won or lost in their entirety. Avande even cites precedent involving criminal law, where it is impossible to be "partially" successful on a claim. As to the Judgment Order in the Plenary Action,[1] which expressly found "in favor of Evans" on thousands of transactions valued at more than $5 million, Avande simply cites the misleading half-truth, implicit in any case involving "partial success," that it too was partially successful. Avande repeats this half-truth in its Answering Brief ("Ans. Br.") ***no less than six times***, even though its partial success involves only a few *di minimus* transactions.

2. ***Defense of Counts III and IV alleging Tortious Interference and Defamation.*** The testimony that Evans was acting in his own interest (Ans. Br. at 42-45) is irrelevant per this Court's guidance that indemnification attaches without regard to the indemnitee's motivation. Evans is entitled to indemnification so long as confidential information was "used or necessary" for the misconduct alleged in these claims, regardless of how Avande pled the claims in its complaint.

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[1] The capitalized and abbreviated terms herein shall have the same meaning as defined in Evans' Opening Brief ("Op. Br."), unless otherwise indicated.

SUMMARY OF CROSS APPEAL ARGUMENT

3. Denied. To the extent that DC Risk paid any of the expenses for which Evans seeks indemnification, Evans suffered a clear and direct out-of-pocket loss because, as Avande acknowledged in its pre-trial submissions, DC Risk is wholly owned by Evans. Avande's attempt to create a distinction between the policy reasons for indemnification and those for advancement, as a justification for denying mandatory indemnification to Evans, conflicts with Delaware law. Delaware courts have awarded both advancement *and* indemnification where another party has paid the indemnitee's expenses without a contractual obligation to do so. Moreover, the distinction is largely moot because, as stated, Evans owns DC Risk, and therefore Evans suffered the financial harm whenever DC Risk paid any of Evans' expenses.

ARGUMENT

I. EVANS IS ENTITLED TO MANDATORY INDEMNIFICATION FOR DEFENDING THE BREACH OF DUTY CLAIM

Avande makes four equally-flawed arguments as to why Evans is not entitled to indemnification for his defense of the breach of fiduciary duty claim: (i) a factual argument that Evans was not successful on the merits of this claim (Ans. Br. at 30-31); (ii) a statutory argument that the alleged legislative history of Section 145 should take precedence over that provision's plain text (Ans. Br. at 36); (iii) a legal argument that indemnification would violate the jurisprudence that Delaware determines indemnification on a "claim by claim" basis, and amount to a "novel theory of proportional indemnification" (Ans. Br. at 31-36); and (iv) a policy argument that mandatory indemnification for Evans' substantial success on this claim would be "unworkable" and violate public policy. None of these arguments withstand close scrutiny.

A. The Judgment Order Confirms The Extent Of Evans' Success

The Judgment Order is crystal clear, and confirms both Evans' success, and the significant extent of his success, in defending against the breach of duty claim brought against him by Avande. The Judgment Order expressly states that:

> "judgment is hereby entered ***in Evans' favor and against Avande on Count II***, with respect to ***(a) any transaction making up the Challenged Amount*** (as defined in the Memorandum Opinion) other than the transactions described in paragraph 1(a) above ***and (b) compensation that Evans received*** from Avande before his termination as CEO of Avande."

A224 at ¶ 2 (emphasis added). The "transactions making up the Challenged Amount" (*i.e.* part "(a)" of Evans' judgment), are several thousand, and the "Challenged Amount" itself is defined by the court as $4,691,097. A195; *Avande v. Evans*, 2019 WL 3800168, at *10 (Del. Ch. Aug. 13, 2019). The "compensation that Evans received" (*i.e.* part "(b)" of Evans' judgment), is an additional $445,815.50. A219; *Avande*, 2019 WL 3800168, at *18. The "other" transactions (on which Avande was successful) number only four ("the Danhaive and Scooter Ricambi transactions") and are valued at a mere $21,817.70. A223 at ¶ 1.[2]

Avande argues repeatedly that Evans was not successful on this claim, or that Avande was the successful party, or that Avande was successful on the claim but for only a small amount of damages, all of which are, at best, half-truths directly contradicted by the Judgment Order. *See, e.g.,* Ans. Br. at 20 ("the Plenary Court ruled in Avande's favor on Count II"); 29 ("judgment was entered in Avande's favor on Count II"); 30 ("Evans' Defense of Count II in the Plenary Action was not successful on the merits"); 31 ("Evans was found liable for breaching his fiduciary duties to Avande"); *id.* ("he was not successful on the merits in defending Count

[2] In terms of the Accounting, which was technically a separate equitable review, and not a part of the breach of duty claim, Evans was once again far more successful than Avande. The Accountant, who was selected by Avande and applied an "entire fairness" standard to $235,845.83 in transactions over a five-year period, found only $43,687.77 in "unfair payments" (A234), and even these were only deemed "unfair" because the Accountant "did not have satisfactory backup documentation" (A237).

II"); 31 n.4 ("Evans was found liable on Count II for breaching his fiduciary duty"); 33 ("the Plenary Court awarded Avande less than all the damages the Company sought").

Avande has briefed this issue as if the statute requires full success on a claim in order to receive any indemnification at all. But the plain language of Section 145 states the exact opposite – that a former officer "shall" be indemnified ***"[t]o the extent"*** that he or she "has been successful ***on the merits or otherwise***" in defense of ***"any claim issue or matter therein."*** 8 *Del. C.* § 145(c) (emphasis added); *see also Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138, 141 (Del. Super. 1974) ("The statute does not require complete success. It provides for indemnification to the extent of success 'in defense of any claim, issue or matter' in an action."). Thus, the statute requires that Avande indemnify Evans to the extent of Evans' success on the breach of duty claim, which the Judgment Order spells out in detail.

B. The Legislative History Of Section 145 Is Irrelevant

Avande seeks to avoid the plain language of Section 145 by relying on legislative history and commentary (Ans. Br. at 36). As this Court has explained, however, the "judicial discretion to construe a statute" only exists "when its language is obscure and ambiguous," (*Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982) (citations omitted); and ambiguity only exists if a statute "is reasonably

susceptible to different interpretations" or if a literal interpretation "would lead to an unreasonable or absurd result" (*Arnold v. State*, 49 A.3d 1180, 1183 (Del. 2012) (citations omitted)); *see also Jung v. El Tinieblo Int'l, Inc.*, 2022 Del. Ch. LEXIS 313, at *10 (Del. Ch. Oct. 31, 2022) ("Where a statute's plain text is unambiguous, a court should not consider its legislative history.") (applying New Hampshire law).

Here, the text of Section 145 is clear that an indemnitee "shall" be indemnified "to the extent" of his or her success "in defense of any claim, issue or matter." 8 *Del. C.* § 145(c). Legislative history and commentary are therefore inapplicable, even if made by a drafter of the statute (which is not alleged here). *See, e.g. Rsui Indem. Co. v. Murdock*, 248 A.3d 887, 903 n.79 (Del. 2020) ("We note that one of the drafters of Section 145 made remarks at a Delaware Corporation Law symposium in 1977 that could be read as conflicting with our interpretation of the statute. … Yet we stand by our reading of the language of the statute.").

Moreover, by its own terms, the purported legislative history that Avande cites involves situations where a former officer or director has "been adjudged liable as to ***some but not all of the claims*** asserted against them." Ans. Br. at 36 (citation omitted) (emphasis added). This is not the situation at bar. The situation here is more aptly described as a "split claim" or "split judgment" on a claim, in which the court entered a Judgment Order that specifically found for Evans on virtually all of the transactions alleged against him within the breach of duty claim.

The plain language of the indemnification statute mandates that Evans be indemnified "to the extent" of his success on this discrete claim. The Court of Chancery needed only to read the text of the statute, and the text of the Judgment Order, and reach the inevitable conclusion that Evans is entitled to substantial compensation for his substantial success on this claim. This result is particularly appropriate, given that Delaware law requires that Section 145 "should be interpreted broadly" in favor of indemnification. *Stifel Fin. Corp. v. Cochran,* 809 A.2d 555, 561 (Del. 2002) (citations omitted).

In its Answering Brief, Avande never challenges, because it cannot, Evans' analysis that the unambiguous plain language of a Delaware statute must be interpreted by its terms. *See* Op. Br. at 25-26. Nor does Avande even argue that the indemnification statute is ambiguous, because it is not.

C. The "Claim By Claim" Jurisprudence Is Inapposite In This "Split Claim" Case

Avande contends that providing indemnification for Evans' almost complete success in defending the breach of duty claim would violate the "claim-by-claim" jurisprudence of Delaware law. Ans. Br. at 31-33. This argument fails because the so-called "claim-by-claim" jurisprudence involves cases where the indemnitee either won or lost each claim in its entirety, not a case, like here, where there is a Judgment Order specifically parsing out the degree of each litigant's success on a specific claim.

In its Answering Brief, Avande quotes the first twenty-seven words of Section 145(c), and then inserts a period where no period belongs. Ans. Br. at 30. There is no period after the word "proceeding." That is, the statute does not only require mandatory indemnification to the extent of an indemnitee's success in any "action, suit or proceeding." Ans. Br. at 30. Instead, there is a comma after the word "proceeding," and Section 145(c) goes on to require mandatory indemnification to the extent of an indemnitee's success in any proceeding OR "in defense of any claim, issue, or matter therein." 8 *Del. C.* § 145(c). Evans is not required to be victorious in the entire proceeding, and if he were so required, then even the "claim-by-claim" jurisprudence that Avande relies upon would directly violate the statute.

The "claim-by-claim" cases relied upon by Avande and the Court of Chancery are inapposite to the situation at bar. Evans is not arguing that the "claim-by-claim" cases were wrongly decided. Rather, those cases all involved instances where an indemnitee received a favorable judgment *in full* on some claims, and an unfavorable judgment *in full* on other claims. For example, Avande quotes the language of *MCI Telecom. Corp. v. Wanzer,* 1990 WL 9110, at *1 (Del. Super. June 19, 1990), which states that "a director who has been partially successful in defending three out of four counts of a civil complaint is entitled to indemnification." Ans. Br. at 32. This is a correct result under the statute, but it is not the situation at bar. The *MCI Telecom* court was not reviewing a Judgment Order that specifically found in favor of one

party for some transactions within a claim, and in favor of the other party for other transactions. If that were the case, then the statute would have mandated indemnification "to the extent" of the indemnitee's success on that "claim." 8 *Del. C.* § 145(c).[3]

None of the cases relied upon by Avande or the Court of Chancery in support of this "claim-by-claim" language involve an instance like here, where Evans has a formal Judgment Order that expressly ruled *in his favor* on a specific number of transactions within a claim, and then computed the exact value of the transactions upon which Evans was successful. *See, e.g., Brown v. Rite Aid Corp.*, 2019 WL 2244738, at *5-7 (Del. Ch. May 24, 2019) (former officer "succeeded in defending himself against all eight counts" in Pennsylvania but then lost motion for costs in Delaware); *MCI Telecom. Corp. v. Wanzer,* 1990 WL 9110, at *1 (Del. Super. June 19, 1990) (granting partial indemnification where former director in alleged kickback scheme successfully defended against conspiracy, fraud and conversion claims, but was unsuccessful in defending breach of duty claim); *Paolino v. Mace*

[3] Avande falsely claims that Evans never raised the issue that the Judgment Order expressly finds for Evans on some transactions, and expressly for Avande on others. Ans. Br. at 31 n.4. To the contrary, Evans argued and briefed this exact issue extensively in the Court of Chancery. *See, e.g.,* A348 ("[T]his is a situation where the Court actually entered judgment ***in favor of Evans*** for a significant part of the claim. The Court actually parsed out that Evans was entitled to judgment in his favor on certain "transactions" and not on others.") (emphasis in original). Indeed, this was the very crux of Evans' argument in that court.

Sec. Int'l, Inc., 2009 WL 4652894, at *1 (Del. Ch. Dec. 8, 2009) (staying indemnification issue and granting advancement for defending against counterclaims); *Zaman*, 2008 WL 2168397, at *2 (granting indemnification for "a dismissed federal lawsuit" and advancement for "most of the claims pending against them").

Contrary to its assertion, it is Avande, and not Evans, that is putting forth a "novel theory" of Delaware law (Ans. Br. at 33), and one that is directly contradicted by Section 145(c). Under Avande's reading of the statute, the fact that Evans was found partially liable on the breach of duty claim, even thought he was also successful on virtually the entire claim, should act as a complete bar to any indemnification at all. This despite clear language in the statute that requires mandatory indemnification "to the extent" of an indemnitee's success on any "claim." Avande cites no case mandating such a result. *See* Opening Brief at 27 (distinguishing each so-called "claim-by-claim" case as inapposite). If any of the "claim-by-claim" cases relied upon by Avande or the Court of Chancery may be interpreted to require the extinguishment of any and all indemnification rights for a "split claim" or "split judgment" case such as this, then that precedent would clearly conflict with the plain language of Section 145(c) and should be affirmatively overturned.

D. Mandatory Indemnification For This Claim Is Neither "Unworkable" Nor A Violation Of Public Policy

Avande argues that it would be "unworkable" (Ans. Br. at 33) to determine the degree of a litigant's success on a discrete claim. Putting aside that this is precisely what the statute mandates, Avande's concern is unfounded. Determining the degree of success on a claim is no more or less problematic than determining the degree of success where an indemnitee is found liable on a handful of claims, and not liable on a handful of others.

Even when claims are won and lost in their entirety, it is often impossible to discretely parse out the amount of money an indemnitee spent defending one claim as opposed to another. A summary judgment response, for example, typically involves a single set of papers and exhibits by which an indemnitee argues all the claims in the lawsuit. Moreover, there are a host of litigable issues that would apply to all or many of the claims in a litigation, such as jurisdictional issues, and arguments regarding waiver, equitable defenses, and statutes of limitations. For this reason, courts have explained that any attempt to quantify a "level of success" in these matters "is only a rough one" and "necessarily involves a discretionary judgment that is not mathematically precise," but that for policy reasons, courts should "err on the side of generosity." *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 178, 187-88 (Del. Ch. 2003) (awarding plaintiff "one-third of his litigation

expenses" despite being entitled to advancement for "a narrow subset of the claims made against him").

Here, the idea that it is somehow "unworkable" to determine the degree of success on a discrete claim is particularly erroneous. To say that the Judgment Order provides a roadmap for determining the degree of Evans' success would be an understatement. The Judgment Order sets forth, in painstaking detail, the exact number of alleged improper transactions, and their dollar values, for which Evans was successful, and the exact number of transactions and dollar values for which Avande was successful, all within the parameters of the breach of duty claim. More than a roadmap to guide a subsequent ruling, the Judgment Order is a neon sign displaying the exact degree of success for each party.

Avande's analogy that a criminal defendant cannot be considered "partially" successful just because he received less than the maximum prison sentence (Ans. Br. at 34) is particularly inapposite. Unlike Evans, the hypothetical criminal defendant lost the criminal claim against him in its entirety, but may have been fortunate to receive a light sentence. It is patently impossible for a criminal defendant to be "partially" successful on a criminal charge, because the defendant is either guilty or not guilty of the alleged crime. In direct contrast, Evans has a Judgment Order that rules "in his favor" for almost the entirety of the breach of duty claim. Avande's

analogy would only make sense if Avande had been fully successful on the claim, but received only a nominal damage award. That is not this case.

Avande's final argument, that awarding indemnification for Evans' extensive success on the breach of duty claim would violate Delaware policy requiring "undivided and unselfish loyalty" from officers and directors (Ans. Br. at 35) fails because the Delaware Supreme Court has expressly ruled that mandatory indemnification under Section 145 attaches "without regard for one's motivation for engaging in that conduct." *Homestore v. Tafeen,* 888 A.2d 204, 214 (Del. 2005) (citations omitted). Delaware law does not require that Evans acted in "good faith" in order to be "successful on the merits or otherwise" for purposes of Section 145(c). *See, e.g., Meyers v. Quiz-DIA LLC*, 2017 Del. Ch. LEXIS 96, at *18 (Del. Ch. June 6, 2017) ("The good faith requirement does not apply to a director or officer who is successful under Section 145(c).") (*citing Cochran v. Stifel Fin. Corp.*, 2000 Del. Ch. LEXIS 58, 2000 WL 286722, at *18 (Del. Ch. Mar. 8, 2000) ("Delaware permits - nay, mandates - indemnification of directors and officers who satisfy the success criteria in § 145(c) regardless of their good faith . . . ."), *aff'd in part, rev'd in part on other grounds*, 809 A.2d 555 (Del. 2002); *Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138, 141 (Del. Super. 1974) (indemnitee accused of a crime need not be found "innocent" in order to be "successful"); *Waltuch v. Conticommodity Services, Inc.* 88 F.3d 87, 96 (2d Cir. 1996) (applying *Merritt-Chapman* to civil

allegations and ruling that "success" does not equate with "moral exoneration")); *See also Rsui. Indem. Co.*, 248 A.3d at 902 (rejecting argument that Delaware public policy requires that "insurance should not be available for intentional wrongdoing").

Thus, Delaware law mandates indemnification for Evans, regardless of Evan's motives for any alleged misconduct. Nevertheless, even assuming *arguendo* that Evans' motives were somehow relevant, the record demonstrates that all of the four transactions on which Avande was successful were for the benefit for someone other than Evans himself. The three tuition payments that Evans approved were for the benefit of an Avande physician consultant who "performed medical reviews for Avande" (A208; *Avande*, 2019 WL 3800168, at *14); and the purchase of a $3,537.50 scooter was for the benefit of Ergun, who had requested a vehicle instead (A211; *Avande*, 2019 WL 3800168, at *15), albeit that Evans had a financial interest in the dealership from which the scooter was purchased. If anything, public policy favors Evans, because Section 145 must "be broadly interpreted" to favor indemnification. *Stifel Fin. Corp.*, 809 A.2d at 561 (citations omitted).

II. THERE IS A CAUSAL LINK BETWEEN EVANS' STATUS AS FORMER CEO AND THE TORTIOUS INTERFERENCE AND DEFAMATION CLAIMS

A. Confidential Information Was Used Or Necessary For Evans To Commit The Alleged Tortious Interference And Defamation

On this issue, the Court of Chancery set forth the proper standards, but made an error of law in evaluating Avande's pleadings, by limiting itself to the language chosen by Avande. The court correctly states that corporate powers must be "used or necessary" for the alleged misconduct; that this requirement is "satisfied" where the allegations concern "post-separation use of confidential information learned pre-separation;" and that Delaware courts typically determine whether there is a causal connection by "examining the pleadings." Mem. Op. at 10-11 (citations omitted). The court committed legal error, however, by "refrain[ing] … from inferring the use of confidential information." Mem. Op. at 11. *See, e.g., Brown v. LiveOps, Inc.*, 903 A.2d 324, 325 (Del Ch. 2006) ("labeling of the counts" is irrelevant where indemnitee "had access to confidential and proprietary information concerning LiveOps's business and customers"); *see also* Op. Br. at 36-38.

In its Answering Brief, Avande implies that it is not required to indemnify Evans for successfully defending the tortious interference and defamation claims, because the alleged misconduct occurred after Evans was separated from Avande. Ans. Br. at 38-39. This argument fails because it ignores the "weight of authority" that the "post-separation use of confidential information learned pre-separation"

satisfies that requirement that the alleged misconduct occurred "by reason of the fact" of the indemnitee's prior corporate position. *Ephrat v. MedCPU, Inc.*, 2019 WL 2613281, at *7 (Del. Ch. June 26, 2019) (citing cases).

Avande then argues that all of the cases Evans cites regarding the post-termination use of confidential information are "distinguishable" because the corporation in those cases "explicitly alleged misuse" of confidential information. Ans. Br. at 39. Avande contends that, unlike the cases cited by Evans, it "did not allege that Evans misused any confidential or proprietary information" in the Plenary Action. Ans. Br. at 41. Avande's argument fails for two reasons. First, Avande *did* allege that Evans misused confidential information; and second, Delaware law does not allow a corporation to control the outcome of this analysis by artfully omitting the magic words "confidential information" from its complaint against a former officer or director.

As to the allegations in Avande's pleadings, while Avande may have skillfully avoided the phrase "confidential information" in its complaint, Avande undeniably alleged that Evans misused his knowledge of Avande's financial condition, and his knowledge of and relationships with Avande's creditors and competitors, all of which is information that Evans necessarily learned pre-termination by reason of the fact that he was Avande's CEO. Specifically, Avande alleged that Evans' post-termination misconduct was ***"based on his prior interactions with third parties***

when he served as CEO." A135-136 (Compl. at ¶ 19) (emphasis added). Avande also alleged that Evans had "made false statements" to vendors and creditors ***"with the knowledge that the Company's solvency and ability to pay its debts would be critical to them."*** A139 (Compl. at ¶ 31). In this second example, Avande is specifically alleging that Evans acted "with the knowledge" he had obtained as CEO. Avande cannot now avoid its mandatory indemnification obligation its failed post-termination claims against Evans simply because Avande omitted the word "confidential" from its pleading.

As to Delaware law, Avande is not required to use the words "confidential information" in its pleading in order for its mandatory indemnification obligations to attach. To the contrary, the relevant inquiry is whether Evans' corporate powers "were used or necessary" for the alleged misconduct (*see Homestore*, 888 A.2d at 214), and whether the alleged misconduct involved the use of confidential non-public information that Evans learned while at Avande (*see Ephrat*, 2019 WL 2613281, at *7). As explained in Evans' Opening Brief, the irrelevance of "magic words" when evaluating a pleading is consistent with Delaware jurisprudence in other areas, such as the distinction between the pleading of a tort claim and a contract claim, and the pleading of a direct claim as opposed to a derivative claim. *See* Op. Br. at 37-38.

Avande's reliance on *Charney v. Am. Apparel* (Ans. Br. at 41-42) is misplaced. Unlike the former officer in *Charney*, Evans is not merely arguing that "but for" his position at Avande he could not have engaged in the alleged misconduct. In *Charney*, a former CEO entered into a "Standstill Agreement" with his former company three weeks after being suspended as CEO. *See Charney v. Am. Apparel, Inc*., 2015 WL 5313769, at *3 (Del. Ch. Sept. 11, 2015). The company later alleged that the former CEO had violated seven specific provisions of that agreement, including post-suspension covenants to refrain from "publicly proposing" a potential takeover, "purchasing or causing to be purchased" additional shares of stock, and "publicly disparaging" the company. *Id.* at *3-4. The *Charney* court found the allegations were not "causally connected" to the former officer's role as CEO because "the parties are litigating a specific and personal contractual obligation." *Id.* at *16 (internal quotation omitted).

Unlike the situation at bar, there was no suggestion in *Charney* that confidential information was used to engage in inappropriate conduct. The former CEO in *Charney* was simply arguing that "but for" his prior role as CEO, he would never have been asked to sign the contract that he was accused of breaching. The court in *Charney* agreed that "[a]lthough it is likely true that 'but for' being a director and/or officer of the Company, Charney would not have been subject to the types of obligations set forth in [the contract]," Charney's former status "did not create a

causal nexus" because the contract "was between the Company and Charney personally" and each side signed separately and was represented by separate counsel. *Charney*, 2015 WL 5313769, at *16. In fact, the court expressly distinguished the contractual relationship in *Charney* from *Pontone v. Milso Indus. Corp.*, 100 A.3d 1023 (Del. Ch. 2008), in which "confidential information [the former officer] obtained as a corporate official [was] used in, and necessary to, his alleged misconduct." *Id.* at *17 (*citing Pontone*, 100 A.3d at 1052).

Other precedent Avande cites is inapposite for the same reason - it involves a contractual relationship between the company and the former officer, having nothing to do with confidential information. *See, e.g., Batty v. UCAR Int'l Inc.*, 2019 WL 1489082, at *1 (Del. Ch. Apr. 3, 2019) (Ans. Br. at 37-38) (alleged violation of a "severance compensation agreement"); *Lieberman v. Electrolytic Ozone, Inc.*, 2015 WL 5135460, at *4 (Del. Ch. Aug. 31, 2015) (Ans. Br. at 38-39) ("each claim is derived from specific contractual obligations which [the former officers] allegedly breached post-termination"); *Weaver v. ZeniMax Media, Inc.*, 2004 WL 243163, at *5 (Del. Ch. Jan. 30, 2004) (Ans. Br. at 39) (alleged violation of employment agreement by "taking too much vacation time and submitting fraudulent travel expenses"). Unlike these cases, Avande never alleged that Evans breached a

separate contractual relationship with the Company that was outside his duties as CEO.[4]

Avande claims that the Court of Chancery made a factual finding that Evans did not require confidential information to engage in the alleged tortious interference or defamation conduct, and that this finding is entitled to "great deference." Ans. Br. at 41. This argument fails because the Court of Chancery, despite making a reference to Avande's trial arguments, made a legal determination based upon its review of Avande's pleadings, and refused to even consider whether the use of confidential information was ever "inferred" in Avande's allegations. Mem. Op. at 11. Moreover, Avande had voluntarily dismissed these claims at trial, thereby mooting the need for any serious examination about the information Evans would

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[4] *Paolino v. Mace Sec. Int'l. Inc.*, 985 A.2d 392, 403 (Del. Ch. 2009) (Ans. Br. at 38) granted advancement and stayed the claim for indemnification, rejecting the argument that all counterclaims had arisen from an employment agreement where the company had alleged breach of "contractual, statutory and common law duties." Likewise, the court in *Reddy v. Elec. Data Sys. Corp.*, 2002 WL 2358761, at *6 (Del. Ch. June 18, 2002) (Ans. Br. at 38-39) granted advancement for defending against breach of contract and other claims because "all could be seen as fiduciary obligations." *Bernstein v. TractManager, Inc.*, 953 A.2d 1003, 1011 (Del. Ch. 2007) (Ans. Br. at 39) is inapposite because in that case, unlike here, there were "no allegations that Bernstein relied on information he obtained as a director or officer" and he made "no serious attempt to argue that the claims were brought against him 'by reason of the fact' that he is or was an officer or director." *Bernstein*, 953 A.2d at 1012. The court in *Perconti v. Thornton Oil Corp.*, 2002 WL 982419 (Del. Ch. May 3, 2002) (Ans. Br. at 39) and *Scharf v. Edgcomb Corp.,* 2004 WL 718923 (Del. Ch. Mar. 24, 2004) (Ans. Br. at 38) granted indemnification where the former officers were charged with embezzlement and insider trading, respectively.

have used. *See,* A223 Judgment Order ("WHEREAS, after trial, Avande did not pursue and thus waived its claims alleged … in Counts I, III, IV, and V of the Amended Complaint").

B. Testimony About Evans' Motives Is Irrelevant Under Delaware Law And Does Not Disprove That Confidential Information Was Used Or Necessary For These Alleged Claims

Avande cites trial testimony from Evans, purportedly demonstrating that after Evans separated from Avande "he acted solely to protect his ***personal*** interests as a creditor of the Company." Ans. Br. at 42 (emphasis in original). Avande then concludes that based upon this testimony, Evans' alleged misconduct was unrelated to his status as a director and CEO, and therefore Evans "did not exploit any confidential or proprietary information he obtained while serving in these positions." Ans. Br. at 45.

As explained above, however, Delaware law is clear that Evans' alleged motives are irrelevant to whether he is entitled to mandatory indemnification under the statute, even if he was acting to preserve personal interests as a creditor who had lent money to Avande. The Delaware Supreme Court has expressly ruled that the causal connection between alleged misconduct and prior officer status exists "without regard for one's motivation for engaging in that conduct." *Homestore,* 888 A.2d at 214 (citations omitted); *see also, Thompson v. Orix USA Corp.*, 2016 WL 3226933, at *5 (Del. Ch. June 3, 2016) ("if self-interest or divided loyalty could

deprive directors and officers of advancement, it illogically would be unavailable when it would be needed most"); *Cochran*, 2000 Del. Ch. LEXIS 58, at *64 ("Delaware permits – nay, mandates – indemnification of officers and directors who satisfy the success criteria in Section 145(c) regardless of their good faith.") (citations omitted).

At best, the testimony Avande cites suggests that Evans was angry that his past-due loan to Avande had not been repaid, and was acting in his own interests as a creditor – all of which is irrelevant to Evans' right to indemnification. In any event, the testimony does not in any way disprove that Evans would have needed to use confidential information to engage in the alleged tortious interference and defamation misconduct.

In Delaware, the "by reason of the fact" standard is interpreted "broadly and in favor of indemnification" (*Pontone*, 100 A.3d at 1050), and all that is required is any "nexus or causal connection" between the indemnitee's corporate capacity and "any of the underlying proceedings" (*Homestore*, 888 A.2d at 214). Avande's allegations against Evans, "based on [Evans'] prior interactions with third parties when he served as CEO" (A135-136; Compl. at ¶ 19), and accusing Evans of misconduct "with the knowledge that the Company's solvency and ability to pay debts would be critical" to Avande's vendors and creditors, satisfies this standard. Evans could only have engaged in the alleged misconduct if he had access to

confidential information about Avande's finances, vendors, creditors and lenders, and any defamatory statements allegedly uttered by Evans regarding Avande's inability to pay its bills would only have been credible given his role as former CEO.

III. THE COURT OF CHANCERY DID NOT ERR IN RULING THAT EVANS IS ENTITLED TO INDEMNIFICATION FOR EXPENSES PAID BY DC RISK

A. Question Presented

Whether the Court of Chancery erred in ruling that Evans is entitled to indemnification for expenses paid by DC Risk, an entity that Evans owns and controls.

B. Standard Of Review

The Court of Chancery's ruling that DC Risk is an entity owned and controlled by Evans is a factual finding that is reviewed "with a high level of deference" and will not be set aside "unless [it is] clearly wrong and the doing of justice requires [its] overturn." *Amersaleh v. Bd. of Trade of City of N.Y, Inc.,* 27 A.3d 522, 529 (Del. 2011) (quotations omitted). To the extent the Court of Chancery ruled that an indemnitee may or may not be indemnified for expenses paid by another, this is a question of law for which the appropriate standard of review is *de novo. See Ocean Bay Mart, Inc.*, 285 A.3d at 136 ("To the extent that [an appellant] challenges the Court of Chancery's legal conclusions or raises questions of statutory interpretation," the Court will "review both questions of law and statutory interpretation *de novo*.") (citations omitted).

C. Merits Of The Argument

1. The Court of Chancery Correctly Ruled That Evans Is Entitled To Indemnification For Expenses Paid By DC Risk

Avande's claim that Evans "suffered no out-of-pocket loss" because DC Risk paid Evans' expenses (Ans. Br. at 11, 46, 48) cannot be squared with its own theory of the case. The central premise of Avande's breach of duty claim is that Evans improperly used DC Risk, his wholly owned entity, to generate revenue for Evans himself. Avande cannot now argue that Evans and DC Risk are separate and distinct, and therefore DC Risk's payment of Evans' expenses relieves Avande of its mandatory indemnification obligation.

In its own pre-trial opening brief, Avande argued that DC Risk is Evans' "wholly owned business entity." A278. In that filing, Avande also described the transactions between Avande and DC Risk as "self-dealing" because of Evans' ownership of DC Risk. A279. Likewise, in its opening brief in support of its motion for judgment on the pleadings, Avande included a "Statement of Undisputed Facts" that described DC Risk as a company "owned by Evans" (B426), quoted the Court of Chancery's findings that Evans was the "sole owner and operator of DC Risk" (B429), and "its sole owner and operator" (B430), and described the payments from Avande to DC Risk as "self-interested payments" (B428).

Indeed, after a three-day trial, Chancellor Bouchard's Post-Trial Memorandum Opinion included findings of fact that "Evans is the owner of

defendant DC Risk" (A172; *Avande*, 2019 WL 3800168, at *1), and that "as Kato was aware, Evans owned and operated DC Risk while working for Avande" (A176; *Avande*, 2019 WL 3800168, at *3). Avande admits in its Answering Brief that these facts, "taken from the record below and the Court of Chancery's post-trial findings in the Plenary Action" are "binding in this proceeding." Ans. Br. at 12 n.1.

Thus, contrary to Avande's assertion, the court's ruling that DC Risk is owned by Evans, and therefore Evans suffered the loss when DC Risk paid any expenses, was based on more than counsel's verbal representation that Evans used DC Risk as a pass-through entity for tax purposes. Ans. Br. Ex. B at 14. Earlier in this same telephonic hearing, before counsel's comment, the court described DC Risk as "a company wholly owned by Evans." *Id.* at 13. There is no evidence in the record suggesting that this conclusion is "clearly wrong" or that "the doing of justice requires [its] overturn." *Amersaleh,* 27 A.3d at 529. Moreover, the time for Avande to challenge Evans' ownership of DC Risk would have been in 2019, when Chancellor Bouchard made the findings of fact that Avande acknowledges are "binding in this proceeding." Ans. Br. at 12 n.1.

Avande's argument that payments by DC Risk nullify its indemnification obligation also fails as a matter of law, because then-Vice Chancellor Strine has expressly rejected the argument "that a corporate indemnitor can reduce its obligations by arguing that the indemnitee's own wholly-owned entity has provided

indemnification." *Zaman v. Amedeo Holdings, Inc.*, 2008 Del. Ch. LEXIS 60, at *109 n.134 (Del. Ch. May 23, 2008) (*citing DeLucca v. KKAT Mgmt.*, 2006 Del. Ch. LEXIS 19, at *31 (Del. Ch. Jan. 30, 2006)).

In *Zaman,* Vice Chancellor Strine stated that "I will not reduce any obligation of the defendants to advance funds ***or indemnify the Derbyshires*** on account of the inclusion of the presence of their wholly-owned entities in the complaints filed by the New York Plaintiffs." *Zaman,* 2008 Del. Ch. LEXIS 60, at *109 (emphasis added). Thus, the ruling in *Zaman* was not limited to advancement rights, as Avande incorrectly contends. *See* Ans. Br. at 50; *see also Zaman,* 2008 Del. Ch. LEXIS 60, at *4 ("I conclude that the Derbyshires are entitled to most of what they seek, ***including indemnification*** for a dismissed federal lawsuit filed against them and advancement for most of the claims against them") (emphasis added).

Moreover, Vice Chancellor Strine explained that the situation in *Zaman* was "analogous" to the advancement case of *DeLucca*. *Zaman,* 2008 Del. Ch. LEXIS 60, at *109 n.134. In *DeLucca,* Vice Chancellor Strine had rejected the argument that "DeLucca's legal fees have been paid by her company, Kingsland, rather than by her, and that the payment of the fees by Kingsland therefore prevents DeLucca from now seeking those fees from them." *DeLucca,* 2006 Del. Ch. LEXIS 19, at *31

The *DeLucca* opinion further explained the rationale for this premise cogently:

> "[T]o embrace [the company's] argument would provide a perverse incentive. If a person owed advancement rights could find an affluent aunt, best friend, or other third party to front her defense costs, she would thereby forfeit her right to seek recompense from the party that should have been advancing those costs on the grounds that she was not "out of pocket" herself even though she was obliged to repay her benefactor. That would be inequitable and reward the refusal to honor promises of advancement.

DeLucca, 2006 Del. Ch. LEXIS 19, at *32; *see also Schoon v. Troy Corp.*, 948 A.2d 1157, 1175 (Del. Ch. 2008) (same).

Furthermore, the Court of Chancery has expressly rejected the argument that Avande makes here, namely that perceived public policy differences between indemnification and advancement only permit a claim for advancement (and not indemnification) where a third-party pays an indemnitee's expenses. *See* Ans. Br. at 49-50. In *Creel v. Ecolab, Inc.,* 2018 Del Ch. LEXIS 518, at *19 (Del. Ch. Oct. 31, 2018), the court stated that "this Court will not allow the purported indemnitor to shirk its obligations because of the efforts of a volunteer." The *Creel* Court "acknowledge[d] that *DeLucca* and *Schoon* arose in the advancement context," but concluded that this "does not provide any justification why Delaware policy should not prevent a corporation from shirking its indemnification obligation when a third-party advances payment without a preexisting obligation." *Creel,* 2018 Del. Ch. LEXIS 518, at *19.

Given that the ruling in *Zaman* was not limited to advancement rights, and that the Court of Chancery in both *Zaman* and *Creel* has expressly analogized the relevant policy rationales for both indemnification and advancement, Avande's argument that public policy only permits a wholly-owned business entity to provide advancement, but not indemnification, is incorrect under Delaware law.

Here, the Court of Chancery properly concluded that denying recovery for expenses paid by DC Risk "would not serve the policy goals of Section 145." Ans. Br. Ex. A at 17 (citing *Sodano v. Am. Stock Exch. LLC,* 2008 WL 2738583, at *16 (Del. Ch. July 15, 2008) ("a company's advancement ***or ultimate indemnification obligation*** is not reduced merely because a volunteer advances ***or indemnifies*** the relevant expenses") (emphasis added), *aff'd. sub nom. Am. Stock Exch. LLC v. Fin. Indus. Regulatory Auth. Inc.*, 970 A.2d 256 (Del. 2009). As Delaware courts have recognized, the policy reasons for indemnification and advancement are essentially the same, the only difference is whether the former officer has his or her legitimate legal fees and litigation expenses paid in advance, or instead recoups them later.

Avande's reliance on *Levy v. HLI Operating Co.*, 924 A.2d 210 (Del. Ch. 2007) (Ans. Br. at 47) is misplaced, as the Court of Chancery in this matter has aptly reasoned. *See* Ans. Br. Ex. A at 17-18. In *Levy,* six former directors had been named as defendants in several securities class action lawsuits, and as to four of these defendants, both the corporation and a third-party defendant investment fund called

the JLL Fund "each possessed a fullest-extent-of the-law contractual commitment to indemnify the [individual defendants] for the same conduct – their actions as directors of [the corporation]." 924 A.2d at 224. When these former directors brought suit "to obtain indemnification for monies paid in settlement on their behalf" by the JLL Fund, the Court ruled that "[s]ince the directors suffered no actual loss as a result of the settlement" they "were not the real parties-in-interest" and therefore the "appropriate cause of action" was a claim for contribution against the corporation by the JLL Fund. *Id.,* at 213.

Unlike the facts in *Levy*, no other entity or individual here has a contractual obligation to indemnify Evans. Accordingly, the Court of Chancery correctly distinguished *Levy*, explaining that the *Levy* directors "had a contract with the investment fund that required the fund to indemnify directors it appointed to the defendant's board," and that here, by contrast, "[t]here is no indication in the record that a contractual scheme similar to the one in *Levy* exists." Ans. Br. Ex. B at 14. More fully, in rejecting Avande's argument, the Court of Chancery properly concluded that:

> Again, there is no suggestion of a preexisting agreement between DC Risk and Evans that would require a different outcome. And I see no basis in our law to conclude that Avande can shirk its mandatory indemnification obligations to Evans simply because DC Risk essentially advanced those payments to Evans. The fact that DC Risk volunteered to pay fees on Evans' behalf does not by itself alleviate Avande of its obligation to indemnify Evans.

Ans. Br. Ex. B at 18.

The fact that Avande's bylaws reiterate the requirement of Section 145(c), that an indemnitee cannot recover expenses for payments that have "actually been made" under any "statute, insurance policy, indemnification, vote, or otherwise" (Ans. Br. at 48) does not alter this analysis. Both Avande's certificate of incorporation, and its bylaws, provide indemnification "to the "fullest extent permitted" by Delaware law (*see* Mem. Op. at 8-9; B919-920), which as explained does not relieve Avande of its indemnification obligations under these circumstances. In any event, as explained above, Evans expressly did ***not*** have his expenses paid by another, because he owns DC Risk. Thus, the Court of Chancery correctly ruled that Evans is entitled to indemnification for expenses paid by DC Risk.

CONCLUSION

For all the aforementioned reasons, as well as those stated in his Opening Brief, Plaintiff respectfully submits that he is legally entitled to indemnification to the extent of his partial success in defending the breach of duty claim against him, and his complete success in defending the tortious interference and defamation claims against him, and therefore the contrary rulings of the Court of Chancery should be reversed. Plaintiff further submits that Avande's cross-appeal should be denied.

Dated: September 27, 2023

/s/ Sean J. Bellew

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